UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE NO. 12-CA-165320

20/20 COMMUNICATIONS, INC.,

Respondent,

and

CHARLES SMITH, an Individual,

Charging Party.

RESPONDENT'S RESPONSE TO THE GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Respondent 20/20 Communications, Inc. ("20/20," the "Company," or "Respondent") pursuant to Rule 102.46 of the National Labor Relations Board's ("NLRB" or "Board") rules, files its Response to the General Counsel's Exceptions to the decision of Administrative Law Judge Rosas ("ALJ"),[1] filed on October 4, 2016. As discussed herein, the General Counsel's Exceptions are unsupported by the record and controlling legal authorities. Therefore, the ALJ's decision must be affirmed with regards to those findings of fact and law to which the General Counsel filed Exceptions. Respondent respectfully incorporates all of the arguments and

[1] The Administrative Law Judge's decision is cited as "ALJD" followed by the appropriate page and line numbers.

authorities in support of its own Exceptions, including its brief in support of those Exceptions, to the extent those arguments and authorities support the ALJ's decision.

1. Exception No. 1 Should Be Rejected as 20/20's Mutual Arbitration Agreement (the "MAA") Does Not Interfere With Employees' Access to The Board.

ALJ Rosas was correct when he did not find that the MAA interfered with employees' access to the board because such a finding would not have been supported by the facts or law in this case. (ALJD p. 1, first paragraph.)

The ALJ's report and recommendations to the board, although advisory, *N.L.R.B. v. Stocker Mfg. Co.*, 185 F.2d 451 (3d Cir. 1950), are entitled to weight. *W.F. Bolin Co. v. N.L.R.B.*, 70 F.3d 863, 1995 FED App. 0333P (6th Cir. 1995). Although an administrative law judge's findings in labor proceedings are not conclusive, they cannot be ignored, and the Board must accord them due weight in making its decision. *Harberson v. N.L.R.B.*, 810 F.2d 977 (10th Cir. 1987). To reject an administrative law judge's findings of fact, some statement of reasons supporting that action is desirable. *N.L.R.B. v. Matouk Industries, Inc.*, 582 F.2d 125 (1st Cir. 1978). Although the National Labor Relations Board may adopt findings of fact and conclusions of law different from the administrative law judge's (ALJ) conclusions, its decision must still conform with the substantial evidence standard. *Local 65-B, Graphic Communications Conference of Intern. Broth. of Teamsters v. N.L.R.B.*, 572 F.3d 342 (7th Cir. 2009).

In the instant case, a finding that the MAA interfered with employees' access to the board would not conform with the substantial evidence standard. If a work rule does not explicitly restrict activities protected by Section 7 of the Act, the Board will find the rule or policy unlawful only if (1) employees would reasonably construe the language to prohibit protected Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has

been applied to restrict the exercise of Section 7 activity. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004).

Here, none of these three circumstances exists. The Company did not promulgate the MAA in response to union activity. Nor has the rule been applied to restrict the exercise of Section 7 activity. Finally, no employee could reasonably misinterpret the MAA as prohibiting Section 7 activity, including the filing of unfair labor practice charges with the Board. *See, e.g., Tiffany & Co.*, 200 L.R.R.M. (BNA) ¶ 2069 (NLRB Div. of Judges Aug. 5, 2014) (finding a confidentiality clause lawful when it expressly excluded protected concerted activity from its coverage). The MAA expressly advises employees it does ***not*** apply to their filing complaints with federal or state agencies. The MAA explicitly states:

> 6. (. . .) **Employee will not be disciplined, discharged, or otherwise retaliated against for exercising his or her rights under Section 7 of the National Labor Relations Act.**

(Joint Ex. 2, ¶6.)

The MAA also states:

> 2. (. . .) Additionally, by agreeing to submit the described claims to binding arbitration, Employee **does not waive his or her right to file an administrative complaint with the appropriate administrative agency** (e.g., the Equal Employment Opportunity Commission or state agencies of a similar nature), but does knowingly and voluntarily waive the right to file, or seek or obtain relief in, a civil action of any nature seeking recovery of money damages or injunctive relief against Employer, except as described above.

(Joint Ex. 2, ¶2.) This language makes expressly clear to employees that they may file complaints with governmental agencies, including the NLRB.

Neither the General Counsel nor the Charging Party offered any evidence that any employee has ever misinterpreted the MAA as prohibiting his or her filing claims with the Board or any other federal, state, or municipal government agency. To the contrary, the fact that

Charging Party Smith has now successfully a charge and amended charge with the NLRB refutes the government's theory and speculation that the challenged policy has some improper "chilling effect" and would restrict the exercise of Section 7 activity. While the National Labor Relations Board may adopt findings of fact and conclusions of law different from the administrative law judge's (ALJ) conclusions, its decision must still conform with the substantial evidence standard. *Local 65-B, Graphic Communications Conference of Intern. Broth. of Teamsters v. N.L.R.B.*, 572 F.3d 342 (7th Cir. 2009). The evidence in this case clearly establishes that the MAA did not deter Charging Party from pursuing his rights and any finding to the contrary would be against the substantial weight of the evidence.

The Fifth Circuit recently made clear that it would ***not*** be reasonable for employees to read an arbitration agreement like the MAA as prohibiting them from filing charges with the Board where the agreement states explicitly that it does not do so. The Court explained:

> Reading the Murphy Oil contract as a whole, it would be unreasonable for an employee to construe the Revised Arbitration Agreement as prohibiting the filing of Board charges when the agreement says the opposite.

Murphy Oil, 2015 WL 6457613, at *5.

Here, the MAA explicitly states that it does ***not*** apply to employees' "right to file claims with federal, state or municipal government agencies." (Joint Ex. 2I at p. 55 (emphasis added); Joint Ex. 2J at p. 56 (emphasis added).) Because the MAA says it does ***not*** apply to such claims, which would include unfair labor practice charges filed with the Board, it would be unreasonable for employees to read the MAA otherwise. Thus, General Counsel's Exception No. 1 lacks merit.

2. Exception No. 2 Should Be Rejected as ALJ Rosas did not include a legal and factual analysis addressing the question of whether Responded violated Section 8(a)(1) of the Act by maintaining a MAA that allegedly interferes with employees' access to the board because there is no factual or legal support for such a finding.

While it is correct that ALJ Rosas did not include a legal or factual analysis addressing the question of whether Respondent violated Section 8(a)(1) of the Act by maintaining a MAA that allegedly interferes with employees' access to the board, this omission is nothing more than proof that the facts and law would not have supported such a finding as further explained in paragraph 1 above. The ALJ's section heading IV. appears to be a typographical error. (ALJD p. 7, lines 40 - p. 8, line 7.)

3. Exception No. 3 Should Be Rejected as ALJ Rosas properly exercised his discretion when finding that 20/20 does not have to reimburse Plaintiff for his attorney's fees.

ALJ Rosas correctly omitted to recommend that Respondent has to reimburse the Charging Party for his attorney's fees. (ALJD p. 9, line 39 – p. 10, line 5) This decision lies within ALJ Rosas' discretion and General Counsel did not argue that there was an abuse of discretion nor is there any indication for an abuse of discretion. *Bill Johnson's Restaurants v. NLRB*, 461 U.S 731, 747 (1983) ("If a violation is found, the Board **may** order the employer to reimburse the employees whom he had wrongfully sued for their attorneys' fees and other expenses") (emphasis added). The Board should accord the ALJ's discretionary decision due weight and cannot ignore this decision. *See Harberson v. N.L.R.B.*, 810 F.2d 977 (10th Cir. 1987).

4. Exception No. 4 Should Be Rejected as ALJ Purposefully Confined His Findings to Class and Collective Actions, And an Extension of His Decision To "Joint Actions" Would Not Have Been Supported by D.R. Horton.

The ALJ's recommended Order does correctly not refer to "joint actions." (ALJD p. 9, lines 13–17 and p.9, line 24–37 paragraphs 1(b), 2(a), 2(b) and 2(c) of the recommended Order; ALJD Appendix at first WE WILL NOT paragraph and first and second WE WILL paragraphs; JX 2 at paragraph 6, last sentence.) Including "joint actions" in the scope of his recommend Order would

not have been supported by the decision that ALJ Rosas is basing his order on. In *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012) the NLRB merely decided as to the waver of class and collective actions and not "joint actions." Thus, a decision as to the legality of the waiver of joint actions would not have been supported by the NLRB's decision in *D.R. Horton*, the purported and sole legal basis for ALJ Rosas' order.

5. Exception No. 5 Should Be Rejected Because the ALJ Properly Allowed Revision of The MAA.

The ALJ correctly allowed 20/20 to either rescind or revise the MAA. (ALJD Appendix, first line of first WE WILL paragraph.) There is no evidence that the remedies issued by the ALJ would be insufficient to overcome any alleged coercive effect that the alleged unfair labor practices may have had and therefore, not giving 20/20 the option to revise the MAA is unwarranted. Accordingly, the ALJ properly determined that 20/20 could "revise its MAA to make it clear that it does not constitute a waiver of the right to maintain employment-related class or collective actions against the company in all forums, and that it does not constitute a waiver to access the process of, or file charges with, the National Labor Relations Board." (ALJD Appendix, first line of first WE WILL paragraph.)

WHEREFORE, the NLRB should hold that neither the facts nor the law support a finding that the MAA interfered with employees' access to the board. It should further affirm the ALJ's finding that 20/20 does not have to reimburse Plaintiff for his attorney's fees, that the ALJ's order does not apply to "joint action" waivers, and that 20/20 is allowed to revise its MAA.

Dated, October 18, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on October 18, 2016, a copy of the foregoing RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE has been filed via electronic filing with:

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